1997

State of Utah v. Philip E. Hollen : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 971018-CA
vs.	:	Priority No. 2
PHILIP E. HOLLEN	:	
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION OF AGGRAVATED ROBBERY, A FIRST DEGREE FELONY, AND AGGRAVATED KIDNAPING, A FIRST DEGREE FELONY, IN THE SECOND JUDICIAL DISTRICT IN AND FOR DAVIS COUNTY, STATE OF UTAH, THE HONORABLE RODNEY S. PAGE, PRESIDING.

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JURISDICTION AND NATURE OF PROCEEDINGS

Defendant appeals his conviction on one count of aggravated robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (1994), and one count of aggravated kidnaping, a first degree felony, in violation of Utah Code Ann. § 76-5-302 (1998). This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(j) (1996).

STATEMENT OF THE ISSUES ON APPEAL AND STANDARDS OF APPELLATE REVIEW

1. Did trial counsel render ineffective assistance in not moving to suppress eyewitness identification testimony?

2. Did trial counsel render ineffective assistance in advising defendant regarding his right to testify at trial?

3. Did trial counsel render ineffective assistance in not requesting a jury instruction on a lesser included offense of unlawful restraint?

"Ineffective assistance of counsel claims present a mixed question of law and fact." *Parsons v. Barnes*, 871 P.2d 516, 518 (Utah 1994) (*citing Strickland v. Washington*, 466 U.S. 668, 698 (1984). The trial court conducted a hearing and made findings of fact with regard to defendant's claim of ineffective assistance of counsel pursuant to rule 23B, Utah Rules of Appellate Procedure. "In ruling on an ineffective assistance claim following a Rule 23B hearing, 'we defer to the trial court's findings of fact, but review its legal conclusions for correctness.'" *State v. Bredehoft*, 966 P.2d 285, 289 (Utah App. 1998) (*quoting State v. Classon*, 935 P.2d 524, 531 (Utah App. 1997)).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The following statutes are reproduced in Addendum A:

Utah Code Ann. § 76-5-302 (1995)	(aggravated kidnaping)
Utah Code Ann. § 76-5-304 (1995)	(unlawful restraint)

STATEMENT OF THE CASE

Defendant was charged with one count each of aggravated robbery, aggravated kidnaping, and aggravated assault (R.6). The trial court dismissed the aggravated assault charge (R.24), and a jury convicted defendant on the aggravated robbery and aggravated kidnaping charges (R.19-20). The trial court sentenced defendant to two

concurrent prison terms of five years to life (R.18), and defendant timely appealed (R.28).

STATEMENT OF FACTS

In the evening and early morning of June 24 and 25, 1995, defendant and his co-defendant Jeffrey Mecham robbed the Cinemark Movie 10 theater in Layton, Utah. During the final movie showings of the night, defendant and Mecham gathered the theater employees at gunpoint and took them up to the manager's office. They forced the manager to remove the cash from the safe and bound the employees' hands and feet with packing tape before they left.

The theater employees were initially shown a photograph array containing the photograph of Michael Cantue, who was then a suspect. Although several employees picked Cantue's photograph out as resembling one of the robbers (R.106-110), none of the employees identified Cantue as the robber in a live lineup (R.112-113). The police later showed the employees another photograph array containing a photograph of another suspect, Dennis Dougherty, but none of the employees identified anyone out of that array (R.115-116).

Defendant and Mecham were later identified by the police as possible suspects, and two separate photograph arrays were prepared (R.116). The photograph arrays were presented to the witnesses as two piles of loose photographs, and the witnesses were allowed to shuffle through them and lay them out on a table in random order.

The photograph arrays were shown to five of the employees,[1] all of whom identified defendant as one of the men who robbed the theater (R.118-123). These same five theater employees likewise identified defendant at trial:

Heidi Maroney. Heidi was working in the concession stand at the theater that evening, and during the final movie showings was cleaning the concession area along with Kristin Rogers and Megan Brimhall (R.173). Defendant came into the kitchen area with a gun, and Heidi looked at him for two or three seconds before defendant told her to turn around (R.177, 180). Defendant had a gauze bandage covering part of his face (R.178). Heidi remembered having seen him when he had come into the theater an hour before, and had wondered what was wrong with his face (R.179-80). Heidi had at that time discussed defendant's appearance with Megan, and had watched him cross the lobby, for five to ten seconds (R.180).

Defendant took Heidi, Kristin, and Megan upstairs to the manager's office at gunpoint (R.182-84). Defendant forced Heidi and the others to kneel on the floor of the manager's office, and bound them with packing tape while the robbery was completed (R.186).

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[1] There were two other employees working that night who were unavailable as witnesses: Kristin Rogers and Steve Nearing were both out of state at the time of the trial (R.107, 109).

When Heidi was shown the first photograph array, she identified Cantue as "very similar" to the robber she had seen, but did not think it was him (R.189, 192). She then saw the live lineup with Cantue, and did not identify him or anyone else (R.189-90). Heidi was later shown the second photograph array with Dougherty, but she did not recognize any of the photographs (R.190). The police then showed her a third photograph array with defendant's photograph, and Heidi identified defendant as the robber with the gauze patch (R.191). Heidi also identified defendant at trial (R.191).

Megan Brimhall. Megan was cleaning the concession area during the final movie showings of the evening (R.196). At some point, she went back to the kitchen area where Heidi and Kristin were working (R.201). Defendant was there holding a gun, and he told Megan to look down (R.202). Before turning away from him, Megan looked at him for four to five seconds in a brightly lit area (R.202, 205). She saw the gauze patch on his face and remembered having seen him earlier when he had come into the theater. At that time, Megan had noticed the gauze and commented on it to Heidi. Megan had watched defendant for a minute or two as he walked through the lobby (R.203-04).

When shown the photograph array that included Cantue's photograph, Megan thought that Cantue resembled the gunman, causing her to jump back (R.213). However, when she saw Cantue in person during a lineup, she knew that he was not the

man who robbed the theater (R.214). Megan was shown the Dougherty photograph array, and did not identify anyone (R.214). When she was shown the two photograph arrays with photographs of defendant and Mecham, she had no trouble identifying both defendant and Mecham as the robbers (R.215). Megan also identified defendant and Mecham at trial (R.211,212).

Mark Mudrow. As the theater assistant manager, Mark was upstairs in the theater office with Nicole George during the final movie showing of the night, counting the box office receipts of the day (R.151). Nicole answered a knock at the door; the three concessions workers–Heidi, Kristin, and Megan–came in, followed by defendant, who was holding a gun (R.152). Mark recalled having seen defendant earlier in the evening when defendant had entered the theater, taking note of him because of the gauze patch on his face (R.154). Defendant ordered Mark to open the safe, and they briefly discussed its contents (R.155). Although defendant told him to look away, Mark looked at defendant repeatedly, for a combined total of about thirty seconds (R.156-57). As assistant manager, Mark had been trained to comply with any requests by a robber, but to look carefully in order to get a description and be able to identify them. Mark therefore paid attention to defendant's appearance (R.158). The office was well lit and small; Mark was generally only about six or seven feet away from defendant (R.157, 163).

The police showed Mark the photograph array with Cantue's photograph, and Mark felt that some faces looked familiar, but did not identify anyone as the robber (R.166). Mark was also shown the live lineup with Cantue, but did not identify anyone (R.166). Mark was shown the Dougherty photograph array, but did not identify anyone (R.116). When he was shown the photograph arrays with defendant and Mecham, Mark identified defendant as the robber with the gauze on his face (R.167). Mark also identified defendant at trial (R.167).

Nicole George. Nicole was upstairs in the theater office counting the money with Mark Mudrow when defendant brought the three concession workers upstairs at gunpoint (R.246). Nicole watched from about five or six feet away as defendant entered the office with a gun (R.247). As an assistant manager, Nicole had also been trained to cooperate during a robbery, but to get a description of the robbers (R.249). Nicole knew that she would be asked to describe the robbers and concentrated on being able to do that (R.255). While defendant was standing near Mark, forcing him to open the safe, Nicole stared at defendant for close to a minute, until defendant turned and saw her looking at him, and she then looked away (R.249). After he gathered the cash from the office, defendant ordered Nicole to go with him and open the downstairs door to the lobby (R.250). When Nicole opened the door, the second robber was standing there with his gun (R.251). He appeared startled to see Nicole and he pressed his gun against Nicole's forehead (R.251). He then pulled his turtleneck collar up over his

nose, but Nicole saw his face for five or six seconds (R.252). Nicole was then taken back up to the office (R.252).

When shown the first photograph array, Nicole identified the photograph of Cantue as being similar to defendant, but stated that it was not him (R.109, 256). She was also shown the live lineup with Cantue, but did not identify anyone as the robber (R.256). Nicole was shown the Dougherty photograph array, but she did not see anyone familiar (R.257). When she was shown the two photograph arrays with defendant and Mecham, Nicole identified both as the robbers (R.258). Nicole also identified defendant and Mecham at trial (R.259,260)

Nathan Nance. Nathan was a projectionist and usher at the theater (R.220). During the final movie showings of the evening, Nathan was with Steve Nearing, an usher (R.222). At one point, Nathan went to the restroom, and when he returned, he saw that no one was working in the concession stand, and could not find any of the other employees (R.223). After looking around, Nathan called out for Steve (R.225). Mecham leaned over an upstairs railing, pointed a gun at Nathan, and walked down the stairs (R.225). Mecham then took Nathan upstairs at gunpoint (R.227). Steve was already upstairs, and Mecham took both Nathan and Steve to the office, where they were bound with packing tape along with the other employees (R.228).

Nathan did not see defendant during the robbery, but remembered seeing defendant come into the theater with the gauze patch on his face (R.233). Nathan did

not recognize anyone out of the Cantue photograph array (R.109, 230). Nathan likewise did not identify anyone out of the Dougherty photograph array (R.116). When he was shown the two photograph arrays with defendant's and Mecham's photographs, however, Nathan identified both defendant and Mecham as the robbers (R.122-23, 231-32). Nathan also identified defendant and Mecham at trial (R.234).

SUMMARY OF THE ARGUMENT

Point I. Trial counsel's decision not to file a pretrial motion to suppress evidence of the eyewitnesses' identification of defendant from the photograph array was a reasonable tactical decision and did not constitute ineffective assistance of counsel. Counsel's decision was based upon a full investigation of the facts, including examining the photographs used, questioning the police regarding the procedures used for the photograph identification, and interviewing the witnesses regarding the strength and consistency of their identifications of defendant. Counsel correctly concluded that there was little likelihood of suppressing the identifications, and felt that filing the motion would have entailed significant risks, including the danger of further reinforcing the eyewitnesses' testimony.

Defendant has also failed to show that a motion to suppress the identifications would have been successful, as the witnesses all had ample opportunity to observe defendant during the robbery, and the procedures used in conducting the photograph identification were not in any way suggestive.

Point II. Counsel's advice to defendant not to testify at trial did not constitute ineffective assistance of counsel because that advice was correctly based upon a balancing of the pros and cons of such testimony. Counsel had reasonably concluded that his client was actually guilty of the crime, and defendant had not offered any explanation or defense which could be presented to the jury by way of his testimony, indicating that defendant would not make an effective witness. Further, defendant would also have been subject to damaging cross-examination which outweighed any possible advantages of having defendant testify, especially since defendant's testimony would have offered nothing more than a bald denial of guilt. Also, in light of the strong eyewitness testimony, defendant's testimony would not have altered the result of the trial, and thus defendant has failed to show any prejudice arising out of counsel's advice.

Point III. Defendant's trial counsel was not ineffective in failing to request a jury instruction on the crime of unlawful restraint as a lesser included offense to aggravated kidnaping. Although unlawful restraint and aggravated kidnaping share common elements, under the facts of this case, the "restraint" of the victims was undisputably committed in the course of a robbery, and there is no rational theory for acquitting defendant of aggravated kidnaping and yet convicting him of unlawful restraint. In addition, counsel's decision not to ask for a lesser included instruction was

a tactically correct decision, since the theory of the defense was that defendant was misidentified, not that he did not intend to commit a robbery.

ARGUMENT

POINT I

DEFENDANT'S COUNSEL WAS NOT INEFFECTIVE IN DECIDING NOT TO FILE A PRETRIAL MOTION TO SUPPRESS EYEWITNESSES' IDENTIFICATIONS, AS COUNSEL HAD STRONG STRATEGIC REASONS FOR NOT FILING A MOTION, AND THERE WAS NO REASONABLE PROBABILITY OF SUPPRESSING THE STRONG WITNESS IDENTIFICATIONS

Defendant argues that his trial counsel was ineffective in not filing a pretrial motion to suppress the eyewitness identifications, as allowed under *State v. Ramirez*, 817 P.2d 774 (Utah 1991). Brief of Appellant, pp. 23-24.

To prevail on a claim of ineffective assistance of counsel, defendant must show (1) that trial counsel's performance was objectively deficient; and (2) that there exists a reasonable probability that absent the deficient conduct, he would have obtained a more favorable outcome at trial. *State v. Crosby*, 927 P.2d 638, 644 (Utah 1996) (*citing Strickland v. Washington*, 466 U.S. 668, 687 (1984)). However, defendant has failed to show that his trial counsel's carefully considered decision not to file a *Ramirez* motion was deficient, or that such a motion would, in fact, have been successful in suppressing the eyewitness testimony which formed the basis for defendant's conviction.

A. Defendant's trial counsel fully considered the advantages and disadvantages of filing a *Ramirez* motion.

In considering a claim that counsel was deficient, this Court will give trial counsel wide latitude in making tactical decisions and will not question such decisions unless there is no reasonable basis for them. *Crosby*, 927 P.2d at 644 (*citing Taylor v. Warden*, 905 P.2d 277, 282 (Utah 1995)); *State v. Bryant*, 965 P.2d 539, 542 (Utah App. 1998) ("we must be persuaded that there was a 'lack of any conceivable tactical basis for counsel's actions'") (*quoting State v. Moritzsky*, 771 P.2d 688, 692 (Utah App. 1989)).

Defendant argues that counsel should have made a motion to suppress the eyewitness identifications, apparently based upon the assumption that simply because *Ramirez* provides that such a motion may be made, it should always be made. *See* Brief of Appellant, p. 25 (trial counsel "should request and thus require the trial court to make a preliminary determination as to the constitutional reliability of the eyewitness identification."). However, there are disadvantages to filing a *Ramirez* motion which must be weighed carefully against the likelihood of obtaining a favorable result. Defendant fails to consider such reasons for not filing a *Ramirez* motion, and simply asserts that "the record does not reveal any reasonable tactic that would mitigate or ameliorate the deficiency." Brief of Appellant, p. 29. To the contrary, defendant's

counsel testified at length at the Rule 23B hearing regarding the tactical reasons for his decision not to file the motion.

First, counsel testified that he carefully evaluated the likelihood of prevailing on the motion, and concluded that the motion would be futile (R.521:24). He talked to the police detective about his procedures for conducting the photograph identification, examined the photographs, and hired an investigator to interview the witnesses regarding the basis and strength of their identifications (R.521:23). Based upon this investigation, he concluded that the identification procedure was not unfairly suggestive (R.521:22-24).

Second, counsel testified that a *Ramirez* hearing would likely have *harmed* defendant's case at trial. The trial court's Rule 23B findings state that "[defendant's counsel] felt that the filing of such a motion would only have the effect of educating the prosecution more about his theory of defense and give already strong identification witnesses yet another chance to rehearse their testimony and further solidify their identification of Mr. Hollen." Finding of Fact # 32 (R.515). *See also* Transcript of Rule 23B Hearing, p. 41 (R.521:41) ("I wanted the prosecutor to spend as little time as possible on this case, hoping he would be less prepared for trial.").

The record shows that defendant's trial counsel fully considered the possible advantages and disadvantages of filing a *Ramirez* motion, and made a reasonable tactical decision not to do so. "Since 'conceivable tactical bases' for defense counsel's

actions are apparent and have some support in the record, and defendant has not overcome the 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,' we must assume defense counsel acted competently." *Bryant*, 965 P.2d at 543-44 (*quoting State v. Garrett*, 849 P.2d 578, 579 (Utah App. 1993)).

B. A motion to suppress the eyewitness identifications would not have been successful.

To establish ineffective assistance of counsel, defendant has the burden of showing not only that his trial counsel rendered deficient performance, but also that "counsel's deficient performance prejudiced him." *State v. Chacon*, 962 P.2d 48, 50 (Utah 1998). Counsel's failure to bring a motion that would have been futile does not constitute ineffective assistance. *See Parsons v. Barnes*, 871 P.2d 516, 525 (Utah 1994). A motion to suppress the eyewitness identification testimony based upon *Ramirez* would have been futile because the factors cited in *Ramirez* as relevant to the issue all indicate that the eyewitness identifications in this case were reliable.

Ramirez lists the following factors to consider in ruling on a motion to suppress an eyewitness identification:

> (1) the opportunity of the witness to view the actor during the event; (2) the witness's degree of attention to the actor at the time of the event; (3) the witness's capacity to observe the event, including his or her physical and mental acuity; (4) whether the witness's identification was made spontaneously and remained consistent thereafter, or whether it was the product of suggestion; and (5) the nature of the event being observed and

> the likelihood that the witness would perceive, remember and relate it correctly.

Ramirez, 817 P.2d at 781 (*quoting Long*, 721 P.2d at 493). These five factors generally fall into two categories: the ability of a witness to accurately identify a perpetrator, and the suggestiveness of the identification procedure used. The witness identifications in this case would not have been subject to suppression under *Ramirez*, as all five of the eyewitnesses had an adequate, and in some cases ideal, opportunity to observe defendant at the time of the robbery, and because the photograph identification procedure was not in any way suggestive.

1. Opportunity and capacity to observe. Defendant asserts that that the witnesses had a "limited opportunity" to view him during the robbery, but supports this assertion only with fragmented, out-of-context quotes from the trial record, without attempting to consider the actual experience of any particular witness in looking at defendant on the night of the robbery. Brief of Appellant, pp. 25-26. For example, defendant misleadingly cites to fragments of Heidi Maroney's testimony ("pretty dark . . . not well lit" and "Facing the wall the entire time") which do not refer at all to the times and places when Heidi was looking at defendant's face. See Brief of Appellant, p. 26. In fact, Heidi testified that she saw defendant's face for several seconds in the well-lit kitchen, and remembered watching him walk across the lobby earlier, taking sufficient note of defendant to discuss his appearance with Megan Brimhall (R.178-79).

Consequently, defendant has failed to meet his burden of showing that a *Ramirez* motion would, in fact, have been successful. *Chacon*, 962 P.2d at 50.

Contrary to defendant's unsupported characterization of the witnesses' opportunity to observe defendant, all the witnesses testified that they saw defendant's face for periods of time ranging from several seconds to minutes, generally up close and in brightly lit rooms. *See* R.177-180 (Heidi Maroney); R.202-205 (Megan Brimhall); R. 156-58, 163 (Mark Mudrow); R.233 (Nathan Nance); R.249 (Nicole George). Although several of the witnesses acknowledged that they were afraid, there was no indication that their fear had any negative effect on their perceptions, and two of the witnesses emphasized that they were concentrating on being able to describe and identify the robbers, as they had been trained to do (R.158, 249, 255). Indeed, defendant's trial counsel fully investigated the witnesses' ability to identify defendant, and "felt that there was high level of certainty with regard to their identification." Rule 23B Hearing Transcript, p. 40 (R.521:40). *See generally Id.*, pp. 36-40 (counsel's analysis of the *Ramirez* factors as applied to these witnesses).[2]

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[2] Even if defendant had made a showing that some particular witness's identification was weaker than others, and could have been suppressed, there are valid tactical reasons for not filing a motion to suppress a weak identification when there are multiple identifications. *See Commonwealth v. Levia*, 431 N.E.2d 928, 933 (Mass. 1982) (noting tactical decision not to suppress weaker identifications in order to seek spillover effect on the strong identifications from impeachment on cross examination of the weaker identifications).

This evidence contrasts with the eyewitness identification ruled admissible in *Ramirez*, where the witness identified a robber who was masked, crouched down in a shadowy area, and viewed from up to thirty feet away. *Ramirez*, 817 P.2d at 784. *See also State v. Willett*, 909 P.2d 218, 220, 224 (Utah 1995) (finding eyewitness's "few seconds" observation of defendant "sufficiently reliable" to be admitted.).

2. Non-suggestiveness of the photograph identification procedure.

Defendant does not make any argument regarding the suggestiveness of the photograph identification procedure, which is one of the factors to be considered under *Ramirez*. *See State v. Mincy,* 838 P.2d 648, 652 n. 1 (Utah App. 1992) (refusing to consider suggestiveness claim in absence of sufficient analysis or citation to authority).

In fact, as defendant's trial counsel recognized, the procedures used for the photograph identification were not suggestive in any way (R.521:23-24). The photographs were given separately to each witness in a stack, and the witnesses were allowed to shuffle through them or lay them out in any order. This approach prevented the officer conducting the photograph identification procedure from in some way suggesting or emphasizing one photograph. *Id.* Defendant's counsel also examined the photographs used in the array, and did not find that the photographs themselves rendered the identification unfair (R.521:26-30). *See* R.475 (photo array of defendant). This procedure is to be contrasted to the "blatant suggestiveness" of the lineup procedure which was ruled to be admissible in *Ramirez*, in which a witness was

informed that a suspect matching the description had been found, and then was asked to identify defendant while he was handcuffed alone to a chain link fence and surrounded by police. *Ramirez*, 817 P.2d at 777.

In addition, prior to the photograph identification of defendant, the witnesses had all been shown multiple photograph arrays and one in-person lineup. As defendant's counsel observed, "it would be hard for the police to have been suggestive when they have shown them 18 pictures prior to this" (R.521:24). There is certainly nothing in the record to suggest that the photograph identification procedure was "something so distorted or tainted that in fairness and justness the guilt or innocence of an accused should not be allowed to be tested thereby." *State v. Bruce* 779 P.2d 646, 651 (Utah 1989) (*quoting State v. Perry*, 492 P.2d 1349, 1352 (Utah 1972).[3]

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[3] Defendant also argues that the eyewitnesses' *in-court* identifications of him were "tainted" by the alleged viewing of defendant by some unspecified witness or witnesses at the preliminary hearing. Brief of Appellant, p. 27-28. However, no one objected to the in-court identifications, and defendant does not argue that counsel's failure to object constituted deficient performance or that allowing the in-court identifications was clear error by the trial court. Defendant's entirely unsupported factual assertion that an unknown witness's in-court identification was tainted is entirely irrelevant to the issue of whether counsel was deficient in failing to file a pretrial *Ramirez* motion.

POINT II

COUNSEL'S CONCURRENCE WITH DEFENDANT'S DECISION NOT TO TESTIFY AT TRIAL DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE

In its Rule 23B findings of fact, the trial court found that from the beginning, defendant "told [his attorney] that he would not accept a plea bargain, that he wanted to go to trial, and that he would not testify." The trial court further found that, because of defendant's decision, his attorney spent little time discussing the matter. Defendant's counsel determined that it would be better for defendant not to testify, and defendant agreed with counsel's advice (R.516-17). At the time of trial, defendant acknowledged on the record that he did not want to testify (R.517).

Defendant now argues that his attorney rendered ineffective assistance in advising him of the advantages and disadvantages of testifying. However, in making this argument, defendant fails to meet his burden of showing that counsel's advice not to testify was so faulty as to fall outside of "the wide range of reasonable professional assistance." *Bryant*, 965 P.2d at 542. Further, defendant has failed to show that he was prejudiced by his counsel's advice.

A. Counsel's advice not to testify was well-founded.

Trial counsel did advise defendant not to testify (R.521:43). In the Rule 23B hearing, counsel testified that he based this advice on two grounds: (1) he had come to

the conclusion that defendant was, in fact, guilty; and (2) he anticipated that defendant would be impeached with prior convictions.

Defendant now asserts that counsel's "unwarranted assumption" of guilt was an improper basis for advising defendant not to testify. Brief of Appellant, p.33. Far from being an "unwarranted assumption," counsel's conclusion that defendant was guilty was virtually unavoidable: aside from the unchallenged and consistent eyewitness testimony, counsel was also aware that defendant and Mr. Meacham had been either convicted or accused of a number of similar robberies. Most importantly, defendant himself never told his counsel that he was innocent (R.531:45). Defendant now asserts that his counsel's belief that defendant was guilty somehow "breached his duty of loyalty to his client." Brief of Appellant, p. 32. However, defendant does not cite to any rule requiring a defense attorney to believe in the factual innocence of his client. On the contrary, a trial attorney who treats a factually guilty client differently than a factually innocent one is grounding his strategy in reality rather than legal fiction.

Defendant ignores the obvious implications of his attorney's conclusion that defendant was guilty. Aside from the ethical problems of an attorney advising a client to testify when he believes that the client will commit perjury, if counsel believes that his client is guilty and the client has not offered any reasonable explanation or defense, it is reasonable to conclude that the client will not be able to offer any such explanation or defense if he takes the stand, and will not make a very good witness. See Rule 23B

Hearing Transcript, p. 46 (R.521:46) ("He had nothing to offer. He had nothing to say that would help his case."). Indeed, defendant himself acknowledged that if he had testified he would have had nothing to offer other than a vague denial. "All I could have said was that I didn't do it. I wasn't there. To the best of my knowledge I have never attended a movie theater in Layton or Davis County" (R.521:69).

Counsel also testified that a second reason for advising defendant not to testify was the fact that defendant had prior convictions which might be brought out on cross-examination. Without any analysis, defendant asserts that counsel's conclusion on this issue was wrong, and that any prior convictions would have been excluded by the trial court, citing *State v. Banner*, 717 P.2d 1325 (Utah 1986). However, under *Banner* and Rule 609(a)(1), Utah Rules of Evidence, the use of prior convictions in cross examination of a defendant is evaluated by conducting a balancing test, weighing the probative value of the evidence against possible prejudice. Defendant has not undertaken any such analysis in his brief, nor has he made a record of what prior convictions defendant had. Consequently, defendant has not provided any basis for this Court to evaluate this issue.

Finally, prior convictions are not the only basis for cross-examination. By testifying, defendant would subject himself to questions and rebuttal testimony regarding any number of issues which would harm his case, including any alibi or explanation he offered in testifying. Perhaps most damagingly, by simple questioning

of defendant regarding his relationship with Mecham, the prosecution would have been able to make defendant's misidentification defense even less likely: defendant would then have had to show not only that the witnesses misidentified him, but that they actually misidentified one pair of associates for another similar-looking pair, while still identifying them in separate arrays.

Accordingly, counsel's agreement with defendant's decision not to testify was reasonable: defendant had no exculpatory evidence to offer, and would have faced cross examination which would likely have significantly strengthened the prosecution's case.

B. Counsel's advice did not affect defendant's prior decision not to testify, and did not prejudice defendant.

Under *Strickland*, defendant has the burden of showing that "but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694. Accordingly, defendant must show (1) that he would have testified, and (2) that his testimony would likely have affected the outcome of his trial. *See State v. Arguelles*, 921 P.2d 439, 441 (Utah 1996). Defendant fails to cite a factual basis for a finding that either of these would have occurred.

Defendant asserts in his brief that he "probably" would have testified if his counsel had properly advised him regarding his right to testify and had informed him that his prior convictions could not have been used in cross-examination. Brief of Appellant, p. 33. Significantly, however, the trial court did not find that defendant

would have testified under those circumstances; the only finding regarding defendant's intent is that defendant early on decided not to testify. R.516-517.

In addition, even defendant's ambiguous assertion that he "probably" would have testified if told that his prior convictions would not be brought out on cross-examination is not supported by the evidence which defendant cites. *See* Brief of Appellant, p.34. Defendant testified only that "I still would have, you know, taken the chance I guess and got up there and said what he wanted me to tell them." R.521:69. Defendant does not, therefore, assert that he would have testified but for his counsel's allegedly erroneous analysis of the likelihood that the prosecution would have been able to impeach him with his prior convictions. Rather, defendant testified only that he possibly ("I guess") would have testified *if his counsel told him to do so.* Even if counsel had concluded that defendant's prior convictions could not be used in cross examination, there is no basis for finding that counsel would then have advised defendant to testify; there were other significant reasons for advising defendant not to testify. *See Arguelles*, 921 P.2d at 441 (lack of evidence to show that defendant would have decided to testify in the absence of counsel's allegedly bad advice).

Finally, defendant does not make any reasonable showing that his testimony would have altered the outcome of the trial. The evidence against defendant was substantial and essentially unchallenged. If defendant had testified, there is no reason to believe that he would have helped his case, as indicated in the analysis above

regarding the soundness of counsel's advice not to testify. *See* supra, Point II.A. Defendant himself stated at the Rule 23B hearing that if he had testified, "[a]ll I could have said was that I didn't do it." R.521:69. Such testimony is hardly likely to have undercut the evidence presented by the prosecution, and would only have served to emphasize to the jury the total lack of any rebuttal to that evidence. *See State v. Chacon*, 962 P.2d 48, 50 (Utah 1998) (defendant failed to show that his proposed testimony would have altered the verdict); *Arguelles*, 921 P.2d at 441-42 ("Proof of ineffective assistance of counsel cannot be a speculative matter but must be a demonstrable reality.") (*quoting Fernandez v. Cook*, 870 P.2d 870, 877 (Utah 1993)).

Accordingly, defendant has failed to show either that he would have testified if counsel had advised him differently concerning use of his prior convictions or that his vague denial of guilt would have altered the outcome of the trial.

POINT III

DEFENDANT'S COUNSEL WAS NOT INEFFECTIVE FOR NOT REQUESTING AN INSTRUCTION ON A LESSER INCLUDED OFFENSE SINCE SUCH AN INSTRUCTION WOULD HAVE BEEN IMPROPER AS HAVING NO FACTUAL BASIS, AND WOULD HAVE BEEN INCONSISTENT WITH THE THEORY OF THE DEFENSE

Defendant argues that his trial counsel was ineffective in failing to request a jury instruction on the lesser included offense of unlawful restraint. Brief of Appellant, p.34. As defendant points out, the offense of unlawful restraint, Utah Code Ann. § 76-

5-304 (1995), is committed whenever a defendant "knowingly restrains another unlawfully." Such "restraint" is necessarily included in the crime of aggravated kidnaping, Utah Code Ann. § 76-5-302 (1995), which is committed (as applied to this case) when the victim is seized, confined, detained, or transported in order to facilitate the commission of a felony. Defendant reasons that, since the elements of aggravated kidnaping necessarily include the elements of unlawful restraint, he was entitled to a lesser included instruction on unlawful restraint.

This argument fails because the fact that unlawful restraint is a lesser included offense of aggravated kidnapping does not without more entitle defendant to a lesser included instruction. Utah Code Ann. § 76-1-402(4) (1995) provides that:

> The court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.

See also State v. Parra, 972 P.2d 924 (Utah App. 1998) (request for a lesser included instruction should be granted only if "a rational basis exists on which the jury could acquit the defendant of the offense charged while convicting him of the alternative offense.") (*citing State v. Baker*, 671 P.2d 152, 159 (Utah 1983)).

Accordingly, an instruction on the lesser included offense would not be mandated unless there was a reasonable basis for a jury to acquit defendant of the greater offense of aggravated kidnaping but convict him of the lesser offense of

unlawful restraint. Under the facts of this case, there was no reasonable basis for such a verdict. Even viewing the evidence in a light most favorable to defendant, the unlawful restraint proven at trial unquestionably occurred to facilitate a robbery. No reasonable interpretation of the evidence would support a finding that defendant "restrained" the theater employees, and yet did not do so in furtherance of the robbery.

In addition, regardless of the legal availability of a lesser included instruction, defendant's counsel would have had a valid tactical reason not to request it: the instruction would have conflicted with defendant's own theory of the case, which was misidentification, not lack of intent to commit a robbery. *See State v. Hall*, 946 P.2d 712, 723 (Utah App. 1997) (failure to request a lesser included instruction was not ineffective assistance because the instruction would have been inconsistent with trial strategy); *State v. Perry*, 899 P.2d 1232, 1241 (Utah App. 1995) (defendant received effective assistance because jury instruction on lesser crime "would have been wholly 'incompatible'" with trial strategy, which relied on the defense of misidentification).

Finally, even if a lesser included instruction on unlawful restraint was appropriate and tactically desirable, defendant has the burden of showing that the verdict would have been different if the instruction had been given. *State v. Payne*, 964 P.2d 327, 334 (Utah App. 1998) (no error if "the evidence of the greater offense was so strong that there is no substantial likelihood of a different outcome had the requested instruction been given."). Defendant has made no effort to do so here.

Accordingly, counsel did not render ineffective assistance in deciding not to request an instruction on unlawful restraint, and defendant has failed to show that he was prejudiced by his counsel's judgment.

CONCLUSION

For the reasons stated, defendant's convictions should be affirmed.

RESPECTFULLY SUBMITTED this 17 day of November, 1999.

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Appellee were mailed by first class mail this 17 day of November, 1999 to:

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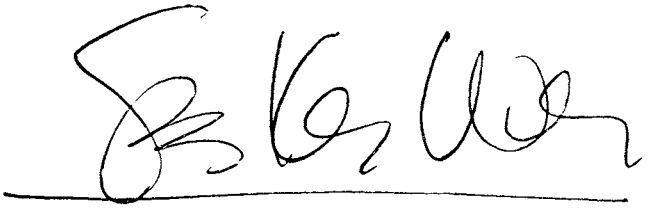

ADDENDUM A

76-5-302. Aggravated kidnaping.

(1) A person commits aggravated kidnaping if the person intentionally or knowingly, without authority of law and against the will of the victim, by any means and in any manner, seizes, confines, detains, or transports the victim with intent:

(a) to hold for ransom or reward, or as a shield or hostage, or to compel a third person to engage in particular conduct or to forbear from engaging in particular conduct; or

(b) to facilitate the commission, attempted commission, or flight after commission or attempted commission of a felony; or

(c) to inflict bodily injury on or to terrorize the victim or another; or

(d) to interfere with the performance of any governmental or political function; or

(e) to commit a sexual offense as described in Part 4 of this chapter.

(2) A detention or moving is deemed to be the result of force, threat, or deceit if the victim is mentally incompetent or younger than sixteen years and the detention or moving is accomplished without the effective consent of the victim's custodial parent, guardian, or person acting in loco parentis to the victim.

(3) Aggravated kidnaping is a felony of the first degree punishable by a term which is a minimum mandatory term of imprisonment of 5, 10, or 15 years and which may be for life.

History: C. 1953, 76-5-302, enacted by L. 1973, ch. 196, § 76-5-302; 1974, ch. 32, § 12; 1983, ch. 88, § 15.

NOTES TO DECISIONS

ANALYSIS

Lesser included offenses.

Defendant charged with aggravated kidnaping was entitled to a jury instruction on assault as a lesser included offense since there was sufficient overlap in elements of two offenses and if jury had accepted defendant's version of evidence, however unlikely that might have been, it could have voted to acquit him of aggravated kidnaping and to convict him of assault. State v. Brown, 694 P.2d 587 (Utah 1984).

Sentence.

—Constitutionality.

The aggravated kidnaping minimum mandatory sentencing provision is constitutional. State v. Russell, 791 P.2d 188 (Utah 1990)

—Upheld.

Concurrent 15-year minimum mandatory sentences for aggravated kidnapping and aggravated sexual assault found not cruel and unusual punishment. See State v. Russell, 791 P.2d 188 (Utah 1990).

Cited in State v. DePlonty, 749 P.2d 621 (Utah 1987); State v. Babbell, 770 P.2d 987 (Utah 1989); State v. Archuleta, 850 P.2d 1232 (Utah 1993).

COLLATERAL REFERENCES

C.J.S. — 51 C.J.S. Kidnapping § 1.

A.L.R. — What is "harm" within provisions of statutes increasing penalty for kidnaping where victim suffers harm, 11 A.L.R.3d 1053.

76-5-304. Unlawful detention.

(1) A person commits unlawful detention if he knowingly restrains another unlawfully so as to interfere substantially with his liberty.

(2) Unlawful detention is a class B misdemeanor.

History: C. 1953, 76-5-304, enacted by L. 1973, ch. 196, § 76-5-304.

NOTES TO DECISIONS

ANALYSIS

Elements.

For cases discussing definition and elements of former offense of false imprisonment, see Smith v. Clark, 37 Utah 116, 106 P. 653, 1912B Ann. Cas. 1366 (1910); Mildon v. Bybee, 13 Utah 2d 400, 375 P.2d 458 (1962).

Kidnaping a minor.

Unlawful detention is not a lesser included offense of kidnaping a minor, § 76-5-301. State v. Cross, 649 P.2d 72 (Utah 1982).

Liability of peace officer.

A peace officer would not necessarily be held liable for mistaking identity of person named in warrant of arrest if he had exercised reasonable diligence and care in ascertaining identity before he served warrant. Mildon v. Bybee, 13 Utah 2d 400, 375 P.2d 458 (1962).

Cited in State v. James, 819 P.2d 781 (Utah 1991).

COLLATERAL REFERENCES

Am. Jur. 2d. — 32 Am. Jur. 2d False Imprisonment § 151.

C.J.S. — 35 C.J.S. False Imprisonment § 71.

A.L.R. — Excessiveness or inadequacy of compensatory damages for false imprisonment or arrest, 48 A.L.R.4th 165.

Penalties for common-law criminal offense of false imprisonment, 67 A.L.R.4th 1103.

Key Numbers. — False Imprisonment ⇦ 43.